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No. 85

85-1839

In the Supreme Court

OF THE

United States

October Term, 1985

BERRY GALLON,

Petitioner,

vs.

LEVIN METAL CORP., a California Corporation, and IDUSTRIAL IRON AND METAL PROCESSING WORKERS UNION, LOCAL 1088,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May, 1986

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AFFIDAVIT OF PROOF OF SERVICE BY MAIL

I, Dorothy Reinhardt declare:

That I am employed in the City and County of San Francisco, California.

That I am over the age of eighteen years and not a party to the within cause. My business name and address is Riteway Haluska Printers, Inc., 1275 Folsom Street, San Francisco, California 94103.

That on June 5, 1986 I served the within Brief in Opposition to Petition for Writ of Certiorari in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 5, 1986, San Francisco, California

Dorothy M. Reinhardt
Dorothy Reinhardt

STATE OF CALIFORNIA
County of San Francisco

On this 5th day of June 1986, before me, Marcia Helmrich, a Notary Public in and for said county and state, personally appeared Dorothy Reinhardt, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument, and acknowledged that she executed it.

Marcia Helmrich
NOTARY PUBLIC

OFFICIAL SEAL
MARCIA HELMRICH
NOTARY PUBLIC - CALIFORNIA
SAN FRANCISCO
My Commission Expires Sept. 9, 1988

Question Presented

Whether the filing and service requirements of Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) should be applied to "hybrid" duty of fair representation-Section 301 suits which are filed in state courts?

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Respondent, Industrial, Iron and Metal Processing Workers Union, Local 1088, hereby submits this brief in opposition to Berry Gallon's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT

Respondent, Levin Metals Corporation, operates a scrapyard in Richmond, California. Petitioner, Berry Gallon, was employed there until March 4, 1983. As an employee, he was represented for purposes of collective bargaining by Respondent, Industrial Iron and Metal Processing Workers Union, Local 1088, (hereinafter, the "Union").

Sometime shortly before the events directly in question in this dispute, Gallon was terminated by Respondent Levin Metals for fighting with another employee. Pursuant to the terms of the then-current collective bargaining agreement between Respondents, Gallon initiated a grievance regarding his termination. The grievance procedure of the collective bargaining agreement required that a grievance over a discharge must be made in writing within 48 hours. Upon the timely filing of this grievance, Petitioner Gallon was reinstated pursuant to a settlement worked out between Respondent Union and Respondent Levin Metals.

Shortly thereafter, however, on or about March 4, 1983, Gallon's employment with Levin Metals was interrupted, apparently for lack of work. Petitioner Gallon characterizes this separation from his employment as a termination. Respondent Levin Metals characterizes it as a lay off. In either event, Petitioner Gallon did not file a written grievance over this event within the 48 hours specified in the contract. Nearly two months later, on April 22, 1983, Gallon's private counsel wrote to Respondent Levin Metals protesting Gallon's "wrongful termination". Respondent Levin Metals replied on June 9, 1983 to the effect that Petitioner Gallon had not been terminated, but laid off.

There was no further contact between Gallon and Respondents until September 22, 1983, when Petitioner Gallon alleges that at a collective bargaining session he was informed by a representative of Levin Metals that his lay off was permanent, and he would never work for Levin Metals again. Nevertheless, he did not file a written grievance within the requisite 48 hours.

On March 13, 1984, more than a year after he had been severed from employment, Petitioner Gallon filed a written grievance protesting his lay off of March 4, 1983. On March 21, 1984, complaint in this matter was filed in the Superior Court of the State of California for the County of Contra Costa. The record from the court below is silent as to whether Petitioner Gallon ever effected, or even attempted, proper service upon this Respondent.

The United States District Court granted Respondent's motion for summary judgment because Gallon had not filed and served his complaint within the six month period required by Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). The United States Court of Appeals for the Ninth Circuit affirmed.

SUMMARY OF ARGUMENT

This matter should not be held in abeyance pending the disposition of *Macon v. ITT Continental Baking Co.*, 799 F.2d 1166 (6th Cir. 1985); (No. 85-1400, petition filed on February 21, 1986) nor *West V. Conrail*, 780 F.2d 361 (3rd Cir. 1985); (No. 85-1804, petition filed on May 2, 1986). The present case should be treated separately since it raises a different issue: The commencement of the duty of fair representation suits in state courts.

The petition should not be granted since the record below is inadequate for resolution of the statute of limitations issue which Petitioner seeks to present. In addition, there is no important question of federal law appropriate for this Court's attention. There is no inconsistency in circuit court authority, nor any conflicting opinion of a state court of last resort. Moreover, the Ninth Circuit's opinion is consistent with *Del Costello v. Teamsters*, 462 U.S. 151 (1983).

ARGUMENT

Petitioner argues that the present matter should be held for disposition pending the outcome of *ITT Continental Baking, supra*, and *West, supra;* alternatively, it is urged that the writ should be granted and the instant matter should be consolidated with those cases. It is respectfully submitted that neither of these alternatives is appropriate.

Unlike the two cases for which petitions have already been filed, the present action was filed in state court. *Berry Gallon v. Levin Metals, et al.*, California Superior Court for the County of Contra Costa, (Case No. 257539, [1984]). Accordingly, disposition of either *West, supra*, or *Continental Baking, supra*, will not necessarily resolve this case. For example, were this Court to decide, as urged by petitioners in *West, supra*, that the service requirements in an action of this type should be governed by the Federal Rules of Civil Procedures, Rules 3 and 4, that would not resolve the issue in this action, nor in the numerous similar actions brought in state courts.

Second, the record below is not adequate for resolution of the issue: What is necessary to commence a duty of fair representation suit for statute of limitation purposes. Complaint in this matter was filed in state court on March 21, 1984. There is no record that petitioner ever served, or even attempted to serve respondent Union.

All the record shows is an answer filed on April 25, 1984. Accordingly, this court would be unable to ascertain whether service was timely and proper within the Federal Rules of Civil Procedure, Rules 3 and 4, or even with the requirements of the California Code of Civil Procedure. Accordingly, a decision that complaint was timely in *West,* or *Continental Baking, supra,* would not resolve the issue presented by this case.

Nor would resolution of the issue in *West, supra,* even resolve the issue of whether complaint was timely *filed* in the present case. The allegedly grieveable occurrence, characterized by petitioner as a termination, took place on March 4, 1983. The applicable collective bargaining agreement requires a grievant to grieve in writing within 48 hours of the occurrence. Petitioner Gallon did not do so. Instead, two months later, on April 22, 1983, Gallon, by counsel, wrote to respondent Levin Metals protesting Gallon's "wrongful termination". Clearly, by then, at the very latest, Gallon's cause of action accrued. But it was not until March 13, 1984, that Gallon filed a grievance. It was not until March 21, 1984, that he filed a complaint in state superior court. Thus, even if this Court were to find that Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), does not require service within six months, Gallon's action would be barred by his failure to file a complaint within six months.

Third, there are no "special and important reasons" for granting the writ in this case. There are no other reported appellate decisions on the issue of whether the service of a complaint is required within the six month period when a hybrid action is filed in state court. The "spate" of reported opinions which petitioner cites as necessitating this Court's attention emanates from the federal courts exclusively. See, *Williams v. Greyhound Lines, Inc.,* 756 F.2d

818 (11th Cir. 1985); *Dunlap v. Lockheed-Georgia Co.*, 755 F.2d 1543 (11th Cir. 1985); *Simon v. Kroeger Co.*, 743 F.2d 1544 (11th Cir. 1984), *cert. den.*, 105 S.Ct. 2155 (1985). There are no conflicting decisions on this issue among the federal appellate courts, nor between the Ninth Circuit's decision and any state court of last resort. In short, there has been no proliferation of litigation on the issue which would warrant resolution by this Court.

Finally, the Ninth Circuit opinion does not conflict with the applicable decisions of this Court. In *Del Costello, supra,* this Court adopted the six month statute of limitations set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). In so doing, this Court indicated that the statute of limitations set forth in Section 10(b) represented a congressional determination which struck the appropriate balance between fostering stable labor relations and insuring finality of the contractual dispute resolution mechanism on the one hand, and protecting aggrieved employees' rights to overturn such settlements on the other hand. A proper balance between these interests is not effected by permitting Petitioner to attempt to resuscitate an alleged breach of the duty of fair representation more than one year after its occurrence. Moreover, a uniform national labor policy, alluded to by this Court in *Del Costello, supra,* is fostered by requiring filing and service within the six months set forth in the statue. The commencing of duty of fair representation actions should not be contingent upon the diverse and often lengthy periods permitted by the statutory service requirements of the various states. See, e.g., California Code of Civil Procedure, §583.210.[1]

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[1] "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendent. . . ."

CONCLUSION

The petition for writ of certiorari should be denied. The disposition of this case shold not be held in abeyance pending the outcome of *Continental Baking, supra,* or *West, supra.*

Respectfully submitted,

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